Mid-Atlantic Painting Contractors, Inc. and Industrial Painting Contractors, Inc. *and* International Brotherhood of Painters and Allied Trades, District Council No. 51, AFL–CIO–CFL. Cases 5–CA–23868 and 5–CA–24044

September 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

Upon charges and amended charges filed on August 31, October 21, and November 15, 1993, by International Brotherhood of Painters and Allied Trades, District Council No. 51, AFL–CIO–CFL, the Union, the General Counsel of the National Labor Relations Board issued an order consolidating cases and consolidated complaint on December 30, 1993, against Mid-Atlantic Painting Contractors, Inc. (MAPC) and Industrial Painting Contractors, Inc. (IPC), the Respondents, alleging that they have violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charges and consolidated complaint, Respondent IPC failed to file an answer. Although Respondent MAPC filed an answer to the consolidated complaint on January 4, 1994, by letter dated June 30, 1994, it withdrew its answer.

On September 6, 1994, the General Counsel filed a Motion for Summary Judgment with the Board. On September 8, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On September 23, 1994, the Respondents filed a response contending that the cases were moot since the companies had ceased operations and had no assets.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the consolidated complaint will be considered admitted. Nevertheless, Respondent IPC failed to file an answer.[1] Further, the undisputed allegations in the Motion for Summary Judgment disclose that, although Respondent MAPC initially filed an answer, it subsequently withdrew that answer. Such a withdrawal has the same effect as a failure to file an answer, i.e., the allegations in the consolidated complaint must be considered to be admitted to be true.[2] Finally, although the Respondents in their response to the notice to show cause have contended that the matter is moot, it is well established that the discontinuance of a respondent's business or its inability to comply with a Board order does not moot the respondent's alleged unfair labor practices.[3]

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent MAPC and Respondent IPC, Maryland corporations, with offices and places of business in Baltimore, Maryland (MAPC's and IPC's facility), have been engaged in the business of providing painting services. During the 12-month period preceding issuance of the consolidated complaint, Respondent MAPC and Respondent IPC, in conducting their business operations, each performed services valued in excess of $50,000 in States other than the State of Maryland.

At all material times Respondent MAPC and Respondent IPC have been affiliated business enterprises, with common officers, owners, directors, managers and supervisors; having the same business purpose and operations; serving the same general contractors and customers; sharing common premises, facilities, and equipment; transferring work between each other; and interchanging and sharing employees.

On a date unknown, Respondent IPC was established by Respondent MAPC, as a subordinate instrument to and a disguised continuance of Respondent MAPC.

Based on the conduct described above, Respondent MAPC and Respondent IPC are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

The complaint alleges and we find that Respondent MAPC and Respondent IPC have been building and construction industry employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that District Council 51, International Brotherhood of Painters and Allied Trades, District Council No. 23 (District Council 23), International Brotherhood of Painters and Allied Trades, Local 100 (Local 100), and International Brotherhood of Painters and Allied

[1] Although it appears that no further reminder letter was sent to Respondent IPC, this does not warrant denying the General Counsel's Motion for Summary Judgment. See, e.g., *Superior Industries*, 289 NLRB 834, 835 fn. 13 (1988).

[2] See *Maislin Transport*, 274 NLRB 529 (1985).

[3] See, e.g., *Ambulance Services of New Bedford*, 229 NLRB 106, 110 (1977); and *Armitage Sand & Gravel*, 203 NLRB 162, 166 (1973). See also *Cornerstone Builders*, 309 NLRB 407 (1992).

Trades, Local 1100 (Local 1100), are now, and have been at all material times, labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

All employees of the Respondents covered by the collective-bargaining agreements described below (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

On or about April 1, 1992, Respondent MAPC, an employer engaged in the building and construction industry, recognized District Council 23 as the limited exclusive collective-bargaining representative of the unit for work performed within District Council 23's geographic jurisdiction, by entering into a collective-bargaining agreement with District Council 23 for the period of April 1, 1992, to March 31, 1995, without regard to whether the majority status of District Council 23 has ever been established under the provisions of Section 9(a) of the Act.

The collective-bargaining agreement described above contains a clause binding Respondent MAPC to the collective-bargaining agreements in effect in geographic jurisdictions outside District Council No. 23's geographic jurisdiction and executed by the employers of the industry and the local unions affiliated with the International Brotherhood of Painters and Allied Trades, AFL–CIO–CFL, in that jurisdiction.

By operation of the above contract clause, Respondent MAPC was obligated to recognize District Council 51, Local 100, and Local 1100 as limited exclusive collective-bargaining representatives for employees performing unit work in the respective geographic jurisdictions of District Council 51, Local 100, and Local 1100, without regard to the majority status of those labor organizations, and to comply with the terms of the collective-bargaining agreements then in effect between those respective labor organizations and painting industry employers in those geographic jurisdictions.

On about August 19, 1992, Respondent MAPC, an employer engaged in the building and construction industry, recognized District Council 51 as the limited exclusive collective-bargaining representative of the unit performing work within District Council 51's geographic jurisdiction, by entering into a Memorandum of Understanding binding it to a collective-bargaining agreement with District Council 51 for the period of May 16, 1992, to May 15, 1995, without regard to whether the majority status of District Council 51 had ever been established under the provisions of Section 9 of the Act.

For the terms of their respective collective-bargaining agreements, based on Section 9(a) of the Act, District Council 23, District Council 51, Local 100 and Local 1100 have been and are the limited exclusive collective-bargaining representatives of the unit, for unit work performed within their respective geographic jurisdictions.

Since around autumn 1992, Respondent MAPC has been using Respondent IPC for the purpose of evading obligations under the collective-bargaining agreements described above, by transferring unit work from Respondent MAPC to Respondent IPC, on jobs including, but not limited to, those at the following times and locations:

(a) Around autumn 1992, at I-66 in Northern Virginia.

(b) Around autumn 1992, at the Susquehanna River toll plaza and bridge.

(c) Around late 1992, at Riva Road near Annapolis, Maryland.

(d) Around early spring 1993, at Route 210 in Southern Maryland.

(e) Around May to June 1993, at Pennsylvania Avenue in Southeast Washington, D.C.

(f) Around May to June 1993, at Route 29 near Columbia, Maryland.

(g) Around late spring 1993, at Powell Creek in Northern Virginia.

(h) Around September 1993, at the 11th Street bridge in Wilmington, Delaware.

(i) Around October 1993, at Virginia Beach Boulevard in Norfolk, Virginia.

Since about July 21, 1993, and again about August 11, 1993, District Council 51, by letters, has requested that Respondent MAPC furnish District Council 51 with the information regarding the respective operations of Respondents and the relationship between them.

The information requested by District Council 51 is necessary for, and relevant to, District Council 51's performance of its duties as the limited exclusive collective-bargaining representative of the unit performing unit work within its geographic jurisdiction.

Since about August 25, 1993, Respondent MAPC has failed and refused to furnish District Council 51 with the information requested by it.

CONCLUSIONS OF LAW

1. The Respondents MAPC and IPC are alter egos and a single employer within the meaning of the Act.

2. By transferring unit work from Respondent MAPC to Respondent IPC for the purpose of evading obligations under the collective-bargaining agreements described above, the Respondents have been failing and refusing to bargain with the limited exclusive bargaining representatives of their employees within the meaning of Section 8(d) and in violation of Section 8(a)(1) and (5) of the Act.

3. By failing and refusing to furnish District Council 51 with requested information regarding the respective

operations of Respondents and the relationship between them that is necessary and relevant to the performance of the Union's duties as the limited exclusive collective-bargaining representative of the unit employees, Respondent MAPC has been failing and refusing to bargain with the limited exclusive bargaining representative of its employees within the meaning of Section 8(d) and in violation of Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondents to make whole unit employees for any losses suffered by them because of the transfer of work from Respondent MAPC to its alter ego, Respondent IPC, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

We shall also order the Respondents to furnish District Council 51 with the necessary and relevant information it requested on July 21 and August 11, 1993.

Finally, as the Respondents have indicated that they have ceased operations, we shall order them to mail copies of the notice to all unit employees who were employed by them at the facility at the time their operations ceased.

ORDER

The National Labor Relations Board orders that the Respondents, Mid-Atlantic Painting Contractors, Inc. and Industrial Painting Contractors, Inc., Baltimore, Maryland, alter egos and a single employer, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with International Brotherhood of Painters and Allied Trades, District Council No. 51, AFL–CIO–CFL, International Brotherhood of Painters and Allied Trades, District Council No. 23, International Brotherhood of Painters and Allied Trades, Local 100, and International Brotherhood of Painters and Allied Trades, Local 1100, as the limited exclusive collective-bargaining representatives of the unit employees, by transferring unit work in order to avoid their obligations under their collective-bargaining agreements.

(b) Failing and refusing to furnish District Council 51 with information that is necessary and relevant to the performance of its duties as the limited exclusive collective-bargaining representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the unit employees for any losses they may have suffered as a result of the Respondents' unlawful transfer or work, with interest, as set forth in the remedy section of this decision.

(b) On request, furnish District Council 51 with information that is necessary and relevant to the performance of its duties as the limited exclusive bargaining representative of the unit employees.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail signed and dated copies of the attached notice marked ''Appendix''[5] to all unit employees employed by Respondents at their facility in Baltimore, Maryland, at the time they ceased operations, at the employees' last known address. Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondents' authorized representative, shall be mailed by the Respondents immediately upon receipt.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

[4] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Therefore, any additional amount owed with respect to fringe benefit and pension funds shall be determined in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with International Brotherhood of Painters and Allied Trades,

District Council No. 51, AFL–CIO–CFL, International Brotherhood of Painters and Allied Trades, District Council No. 23, International Brotherhood of Painters and Allied Trades, Local 100, and International Brotherhood of Painters and Allied Trades, Local 1100, as the limited exclusive collective-bargaining representatives of our unit employees, by transferring unit work in order to evade our obligations under our collective-bargaining agreements.

WE WILL NOT fail and refuse to furnish District Council 51 with information that is necessary and relevant to the performance of its duties as the limited exclusive collective-bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole unit employees for any losses they may have suffered as a result of our unlawful transfer of unit work, with interest.

WE WILL, on request, furnish District Council 51 with information that is relevant and necessary to the performance of its duties as the limited exclusive bargaining representative of the unit employees.

MID-ATLANTIC PAINTING CONTRACTORS, INC. AND INDUSTRIAL PAINTING CONTRACTORS, INC.